United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1220

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1220

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

JOHN SAVINO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT JOHN SAVINO'S BRIEF

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant-Appellant
522 Fifth Avenue
New York, New York 10036
687-4100

GERALD L. SHARGEL
Of Counsel

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

UNITED STATES COURT OF APPEALS
FILED
MAY 17 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT'D)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74 - 1220

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JOHN SAVINO,

Defendant-Appellant.

BRIEF FOR APPELLANT
JOHN SAVINO

Preliminary Statement

The Appellant, JOHN SAVINO, appeals from a Judgment of Conviction in the United States District Court for the Southern District of New York, adjudging him guilty of one count of conspiracy in violation of Title 18, United States Code, Section 371 and one substantive count of Securities violation, Title 15, United States Code, Section 77x, 77x and 17 C.F.R., Section 230.256. As a result of this conviction, the Appellant was

sentenced to the custody of the Attorney General or his duly authorized representative for concurrent terms of two and a half years on each count. In addition, the Appellant was fined in the total amount of $15,000.

The Indictment appears on p.10 of the Appellants' Joint Appendix.

STATEMENT OF THE FACTS

The Appellant, JOHN SAVINO, was named, along with sixteen co-defendants, in a 38-count Indictment charging a variety of criminal offenses relating to the fraudulent promotion of a public stock offering of At-Your-Service-Leasing (AYSL), a New Jersey auto leasing company.[1] In support of the Indictment, the Government called 26 witnesses on its direct case in its attempt to establish the defendants' complicity in the allegedly fraudulent scheme.

THE S.E.C. WITNESSES

The eight-week trial began with the testimony of two

[1]As a result of various severance Motions, both at the instance of the Government and the defense, only four defendants, each of whom now appeal, were tried together. Another defendant, Pasquale Fusco, was severed after suffering a heart attack during the course of the trial.

attorneys employed by the Securities and Exchange Commission. Ruth Appleton, Chief of "Small Issues" in the Washington office of the S.E.C., related that she was the administrator of the "Regulation A" filings with the various regional offices of the S.E.C. (T 254)[2] Mrs. Appleton explained to the jury the structure and purpose of the Regulation A registration. (T 255) Testifying as an expert witness, the attorney reviewed the disclosure requirements (T 256 - 262) and the necessary elements of the offering circular. (T 262) The witness also noted that the facts presented by the offering circular are accepted on their face and not routinely investigated by the regulatory agency. (T 259) Further testimony of the witness defined the so-called "mini-maximum" type of offering where the S.E.C. requires that a certain amount of stock must be sold by a specified date with the express provision that if the minimum sale is not accomplished by the deadline, the investors who had made purchases would have their monies refunded. On the other hand, if the sale of the established minimum amount of shares is accomplished in a timely fashion,

[2]The letter "T" refers to the trial transcript while the letter "A" introduces reference to the Appellants' Joint Appendix.

the transfer of stock is made and the company receives the proceeds. (T 263) Relevant to the facts developed in the case at bar, the witness drew reference to the requirement that a change in the underlying circumstances of the offering would mandate that the offering be halted until amendments could be filed which would reflect the appropriate changes. (T 269)

Michael Goldberg testified that in 1970, he administered the Regulation A registrations in the New York regional office of the S.E.C. Through this witness, the S.E.C. file on AYSL was introduced into evidence. (T 283 - 289) With reference to the "mini-maximum" deal earlier described, the witness testified that the terms of the AYSL offering was that within 90 days from the effective date of April 8th, 1970, 50% of the AYSL stock or 50,000 shares would have to be sold if the company were to retain the proceeds of that offering. (T 296 - 297) Aside from the inevitable claim that what actually occurred with the sale of AYSL stock bore no relation to the four corners of the offering circular, Goldberg's testimony established that the AYSL file did not contain the statutorily required "2 A" report which would reflect the manner in which the sale of shares was effected and other attendant facts and circumstances. (T 298 - 298A) Finally, Goldberg testified that the S.E.C.

was never notified that any of the defendants on trial "had anything to do with" the public offering of AYSL. (T 299 - 303) On January 28th, 1971, the AYSL offering was temporarily suspended by the S.E.C. This suspension became final on June 4th, 1971. (T 304)

CO-CONSPIRATOR WITNESSES

Edmond Graifer, who at the time of his testimony was awaiting sentence on his plea of guilty to two Federal Indictments, including the one at bar, related that in 1970 he was a partner in AYSL and, as such, was responsible for the day-to-day operations of the company. (T 397)[3] Graifer testified that he purchased a share of the company in 1967 and that between the years 1966 to 1970, AYSL made no profit and, in fact, had incurred heavy debt. (T 399 - 400) Moreover, the debt which was incurred was personally guaranteed by the principals of the company. (T 400) In 1969, the company owed in excess of $100,000. (T 402) Although short of capital, the principals of AYSL had no lack of imagination when they ultimately decided that a public offering might mend their fiscal fences.

[3]The witness testified that he was a partner in this business with four certified public accountants. These individuals, Price, Ferdinand, Janek and Handler were severed as defendants and are currently awaiting trial.

(T 402) Thereafter, the witness described several efforts to effect their plan, all of which were unavailing. (T 403 - 404)

Finally, in mid-1969, the witness was introduced to Andrew Nelson, a principal of Tech-Ec Systems, a company "engaged in bringing companies public". (T 405) For the sum of $20,000, Nelson would prepare the offering and secure an underwriter to sell the securities. (T 405 - 406) Following the retention of Tech-Ec and the printing of an offering circular, AYSL met repeated failure in its attempt to sell the stock. Underwriters retained for this purpose either failed (T 411) or expressed the harsh reality that because of the company's financial condition, AYSL was not a saleable item. (T 420) Toward the end of April or the beginning of May, 1970, the campaign to sell AYSL stock to the public was almost a total failure. (T 426) Each effort caused new debt and the company, already a financial cripple, was weakening. (T 427) In addition, the AYSL principals faced the stark realization that the effective date of their offering had passed and they were within the 90-day period in which the "mini" portion of the stock had to have been sold. (T 427)

After describing AYSL's seemingly darkest hour, Graifer's

testimony drew reference to the defendant, Ralph Lombardo. (T 428) Graifer testified that Lombardo, who had been leasing autos from AYSL, accompanied him to Florida to see one Sebastian Aloi in yet another effort to sell the shares of the witness' company. (T 431) According to Graifer, Lombardo was aware of the previously unsuccessful efforts to sell the stock and indicated to Graifer that the problem might be solved by Aloi. (T 470) With reference to the prospect of success in this forum, Graifer allegedly told his partners in AYSL that this would "not be a normal, average deal" and in fact would be "unclean". (T 472)

In Florida. Graifer met with Buster Aloi[4] and Ralph Lombardo to discuss the public offering. Graifer testified that he told Aloi that less than forty days remained to dispose of the minimum portion of the AYSL stock. (T 475) The elder Aloi was then said to have suggested, in response to the problem, that Mike Hellerman could work out the deal. (T 476) Graifer, apparently aware of Hellerman's reputation as a swindler, expressed deep concern when the name was mentioned.

[4]Sebastian "Buster" Aloi, a severed co-defendant, is the father of the defendant, Vincent Aloi. (T 479)

(T 476) However, Graifer asserted that he was pacified when Aloi represented that Johnny Dio[5] was Hellerman's partner and that in the event of a problem, "Johnny will take care of it". (T 477) Negotiating further, it was settled that if Hellerman could dispose of the stock, Buster Aloi would become the guarantor of any obligations that Graifer incurred. (T 478)

In early June, 1970, Graifer, along with Lombardo, met Michael Hellerman in a mid-town restaurant, the Longchamps Riverboat. (T 481) Prior to the meeting, Graifer and Lombardo allegedly discussed the offering and the manner in which Hellerman would handle the deal. (T 482) According to Graifer, it was agreed that if AYSL was successfully brought public, Lombardo would become a nominal employee of the company for $200 per week in addition to the free usage of AYSL autos and credit card privileges. (T 482)

At the initial meeting with Hellerman, Graifer explained the business activity of AYSL together with its financial difficulties. (T 483) Hellerman was quoted as stating that to bring AYSL public was a "very simple deal". (T 484) Noting

[5]John Dioguardi.

that he would first need Johnny Dio's approval, Hellerman stated that in the event the offer was accepted, he, Hellerman, would require $45,000 to be paid "under-the-table". (T 484)

Immediately thereafter, the participants drove to what was later described as Johnny Dio's office and Graifer was instructed to remain downstairs while Hellerman and Lombardo allegedly went to see Dioguardi. (T 488) Returning shortly thereafter, Hellerman stated to Graifer that "Ed, there will be no problem. We will all be rich. I can do this deal." (T 489) As a condition precedent, however, Hellerman stated that $22,500 was needed "up front" or in advance. (T 489) The "front" money was allegedly to be held in escrow by Johnny Dio. (T 490)

Following the meeting, Graifer's only reservation was his inability and apparent unwillingness to advance half of Hellerman's undisclosed fee. (T 491 - 492) Lombardo, however, allegedly stated that Graifer was not to worry about it and that he, Lombardo, would arrange to advance the monies. (T 492)

After describing the groundwork for the AYSL-Hellerman deal, Graifer's testimony shifted to the alleged involvement of the Appellant, JOHN SAVINO, and his then co-defendant, Pasquale Fusco.[6] (Footnote on next page) The witness, Graifer,

met the Appellant and Fusco in 1969. (T 495) Later, the two leased cars from AYSL. (T 496) Approximately one week after the Hellerman-Lombardo meeting at the Riverboat Restaurant, the meeting at which the $45,000 fee was set and agreed to, the witness met the Appellant and Fusco at the Skyway Motel in Queens. (T 498) Quite accidentally, through an inquiry by a third party, Fusco and the Appellant learned that Michael Hellerman was taking care of the AYSL deal and that "the stock looks like its going to all be sold". (T 511) Overhearing the conversation, Fusco expressed anger and with several expletives assailed Hellerman's character. (T 511) Answering Fusco's further inquiry, Graifer recounted how the deal came about and further revealed that Hellerman was to get "$45,000 under the table to sell the stock". (T 511)

Further angered by the fact that Hellerman was receiving $45,000, Fusco exclaimed that Hellerman "still owes us $10,000 from awhile back". (T 511) Inquiry was then made as to whether "Big Vinny" or the defendant, Vincent Aloi, (T 513) knew about this arrangement with Hellerman. (T 512 - 513) During this conversation, the Appellant SAVINO's participation

[6]Unfortunately, throughout most of the trial testimony, SAVINO and Fusco became a single entity often-times indistinguishable.

was described in one sentence:

> "[He] said that he and Fusco were partners on the $10,000 that was still owed and this guy Hellerman was no goddamn good, he would swindle his own mother and father." (T 512)

Shortly after this conversation, the defendant, Ralph Lombardo, arrived and, according to Graifer, was annoyed when told that Fusco and the Appellant had learned of the deal. (T 516)

Two days after the meeting at the Skyway Motel, Lombardo allegedly reported to Graifer that Hellerman could not sell the AYSL stock and that the deal would have to be forgotten. (T 516 - 517) Graifer testified that he did not accept this disposition of the matter. Upon further inquiry, Lombardo allegedly implied that the deal was terminated because Fusco and SAVINO "went to see Vinny Aloi". (T 518)

Graifer's "feeling" that the deal was called off because of Fusco and the Appellant caused him to return to Florida to see the elder Aloi. (T 519 - 520) Upon learning of the problem, Buster Aloi allegedly stated that he would get in touch with his son and "get this all straightened out". (T 521) Graifer then allegedly dialed a New York number whereupon Buster Aloi took the phone, asked to speak to his

son and entered into a conversation in Italian which Graifer did not understand. (T 523) Ending the conversation, Buster Aloi stated to Graifer that he spoke to his son and everything would be straightened out. (T 526) Returning to New York, Graifer met with Hellerman who told him that the problem had been solved and the deal was on again. (T 528) Hellerman was also alleged to have stated that,

> "Savino and Fusco are going to get their $10,000 and I have to give Ralph back $10,000 which I owe him and the rest of the money is going to Johnny." (T 530)

Lombardo also allegedly affirmed the fact that the $45,000 would be divided in this fashion. (T 532)

The balance of Graifer's testimony described the progress of the AYSL deal, including the closing, until finally $45,000 in cash was delivered to Lombardo for the services that Hellerman had performed. (T 553) Lombardo was then said to have told the witness that the money was to be brought to Vincent Aloi and distributed in the manner previously described, with $10,000 to be given to SAVINO and Fusco. (T 568) At a later conversation, Lombardo allegedly reported that the money had been disbursed, that he, Lombardo, had gotten his $10,000 and that $10,000 was given to SAVINO and Fusco. (T 570)

Graifer also learned at about this time that the stock of AYSL was being manipulated and that it had advanced from $3.00 to $6.00 per share. (T 571)

Shortly after the public circulation of AYSL stock was effected, the witness, Graifer, received a subpoena from the S.E.C. (T 584) After Graifer's visit to the Federal agency, a meeting was arranged at the Tamcrest Country Club in Montvale, New Jersey. (T 601) Among those at the meeting were the defendants, Vincent Aloi and Ralph Lombardo. (T 602) Information that the witness had learned from his visit to the S.E.C. allegedly prompted internal problems concerning the distribution of money. (T 603) According to Graifer, Vincent Aloi stated that with the help of Johnny Dio, "this will all be worked out". (T 603 - 604)

Finally, Graifer's testimony focused on conversation with Fusco and the Appellant through which it could be inferred that the Appellant had received his portion of the $10,000. (T 608, 620, 652)

Michael Hellerman, after reciting his extensive criminal involvement and bargain for freedom with the Government, stated that at the time of his testimony, he had known the defendant,

Dioguardi, for approximately eight years. (T 1706 - 1712) Over the years, a social and business relationship developed and finally an agreement was allegedly struck whereby Dioguardi would have an interest in Hellerman's business deals. (T 1717) Hellerman also expressed his acquaintance with the other defendants on trial. (T 1718 - 1726) With reference to the defendant, Lombardo, Hellerman testified that in December, 1968, he had borrowed $10,000 with an agreement to pay interest at two per cent weekly. (T 1727)

Recalling an earlier deal concerning a company called Trimatrix, Hellerman testified that "Fusco and Savino" invested $10,000 for which they received 5,000 shares of the company. (T 1734 - 1735) Hellerman noted that the stock certificate for the Trimatrix shares was issued in the name of the Appellant SAVINO's wife, Lillian Savino. (T 1735) Although the Trimatrix deal was later described as indisputably legitimate, the Appellant and Fusco lost their investment when Trimatrix failed. (T 1739) Following the loss of the $10,000 investment, SAVINO and Fusco evidenced their disappointment with Hellerman and, through conversation, Hellerman learned "that they felt that I robbed them on the loss of the $10,000". (T 1741) Later, according to Hellerman, "they

kept pressing me for the $10,000 and I kept stalling them". (T 1741) In early 1970, Hellerman was allegedly summoned to Dioguardi's office where Vincent Aloi and Fusco, but not the Appellant, SAVINO, were present. (T 1741 - 1742) At that meeting, Aloi is said to have stated that he wanted SAVINO and Fusco to get their $10,000 back. Despite protests that the debt did not really exist, Dioguardi, out of friendship, assured Aloi that when Hellerman earned money, SAVINO and Fusco would be repaid. (T 1742)

Later in 1970, after the agreement had been reached that SAVINO and Fusco would be repaid when Hellerman earned money, the AYSL deal was allegedly brought to Hellerman by Ralph Lombardo. (T 1743) Thereafter, Hellerman's testimony focused on the terms and progress of the deal which substantially corroborated the account given by Graifer. Through Hellerman's testimony it was similarly developed, and again by hearsay, that Fusco and SAVINO, after accidentally having learned of the deal, had been causing problems. On an early occasion, Lombardo is alleged to have stated to Hellerman that problems had arisen because Fusco and SAVINO had convinced the Alois that Hellerman would rob the money.(T 1801 - 1802) Hellerman then offered to do the AYSL deal without the required "front

money". In reply, Lombardo is quoted as having said that this way, SAVINO and Fusco could not tell the Alois that he, Hellerman, was going to rob the money. (T 1802)

Eventually, Hellerman's offer to bring AYSL public without money in advance was allegedly accepted by Vincent Aloi with the proviso that Lombardo would be repaid the monies that he was owed and that SAVINO and Fusco would be returned their $10,000. (T 1836 - 1837) Hellerman testified that this new division of the monies was the result of "Savino and Fusco bugging Vinny". (T 1837) Although claiming that the new arrangement was not "fair", Hellerman stated that he would do it. (T 1838) At a later meeting, attended by Hellerman, Lombardo and Dioguardi, the new deal was again attributed to "Johnny Savino and Checko [Fusco] going to Vinny Aloi and killing the first deal and insisting that they get paid the $10,000 in order for me to be able to get the deal". (T 1841)

A short time later, Hellerman accidentally met the defendant, Fusco, and after Fusco allegedly inquired as to the progress of the deal, he allegedly stated that "you only got the deal because of Johnny Savino and myself". (T 1846 - 1847) To further impress Hellerman with this fact, Fusco allegedly asked the witness to join him and Vincent Aloi for

a drink at which time Fusco is reported to have stated to Aloi, in Hellerman's presence, "Tell him he only got the deal because of Johnny Savino and myself" to which Vinny Aloi allegedly "nodded his head yes". (T 1850)

One week before the closing of the AYSL stock offering, SAVINO and Fusco allegedly visited Hellerman in his office. At this time, "they" asked the witness how the closing was coming. Fusco told Hellerman that he had borrowed $10,000 from Aloi and that he wanted to make sure that he got the $10,000 back and for this reason was interested in the progress of the closing. (T 1854) After the closing, Hellerman related a conversation with the defendant, Dioguardi, during which the witness had allegedly been told that SAVINO and Fusco had received their share of the proceeds. (T 1873 - 1874) Seeing the Appellant SAVINO after the $45,000 had allegedly been distributed, the witness had a conversation during the Appellant allegedly replied that "I had to do that, Mike..." in response to Hellerman's claim that he and Fusco "didn't do a right thing". (T 1912) Fusco, at another time, was told by Hellerman, according to his testimony, that it wasn't right for him to "kill the deal" to get his $10,000 back. (T 1913)

Other co-conspirators and persons who were instrumental in bringing AYSL public testified as to the procedural aspects of the offering. Andrew Nelson, the principal of Tech-Ec Systems, who drew up the offering circular for AYSL, testified that on one of his visits to Hellerman's Manhattan office, he waited to see Hellerman for a period of some thirty to forty-five minutes. (T 2797) Prior to his entering the office, he observed the Appellant, SAVINO, and Fusco exit Hellerman's office and thereafter found Hellerman in a "bad mood". (T 2797 - 2798)

Morris Winter, an attorney who pleaded guilty to his involvement with AYSL (T 3233), testified that he knew the Appellant, SAVINO, and the defendant, Fusco, having met them at a restaurant owned by Hellerman in 1968. (T 3239) Winter had been involved with the Trimatrix Company in which SAVINO and Fusco had invested. With regard to Trimatrix, Winters' testimony focused on a stock certificate issued to SAVINO which was returned by Hellerman after SAVINO and Fusco allegedly received their $10,000 from the AYSL offering. (T 3259 - 3260) Winter also recalled a conversation with Hellerman where Hellerman stated that Dioguardi was being pressured to have Hellerman return to SAVINO and Fusco the $10,000 which they invested in Trimatrix. (T 3254 - 3255)

Donald Fisher, another named defendant who pleaded guilty prior to trial, also testified as to the composition of the AYSL deal and the manner in which a market was made and the stock manipulated. (T 3172 - 3219)

CORROBORATIVE WITNESSES

Some fifteen witnesses were called by the Government in an effort to substantiate the alleged involvement of the defendants on trial essentially testified to by Graifer and Hellerman.

John Kelsey, who was allegedly present at many of the conspiratorial meetings, testified that he was told by Hellerman that SAVINO was owed from $8,000 to $10,000 on the Trimatrix deal. (T 1533)

Steven Shoengold, who was an employee of J.M. Kelsey & Co. in 1970, similarly testified to various relevant details of the AYSL deal and with regard to the Appellant, testified that he had met him in the company of Hellerman. (T 3011 - 3013)

Carl Burgess, an agent with the Federal Bureau of Investigation, was prepared to lay a foundation for a fact that was ultimately stipulated to; that is, that the Appellant SAVINO's fingerprint was found on the Trimatrix stock certificate which was issued to Mrs. Savino, together with a letter

from Morris Winter to Mrs. Savino. (T 3419)

Thomas Moffitt, a part-owner of the Holiday Inn located in Rockville Centre, Long Island, testified that for approximately six years until late 1969 or early 1970, Michael Hellerman operated a restaurant on those premises. (T 3452 - 3453) At the restaurant, Moffitt was introduced to, among others, the defendant Dioguardi, the Appellant SAVINO and the defendant Fusco. (T 3456) Moffitt testified that there came a time when he invested some $25,000 in the Trimatrix Company. (T 3459) Eventually, Moffitt became Chairman of the Trimatrix Company. (T 3459) The witness then recalled that Fusco and SAVINO had also bought stock in Trimatrix. (T 3459 - 3460) In fact, they had purchased 5,000 shares for the price of $10,000. (T 3462) The witness also related that these stocks were issued in the name of SAVINO's wife. (T 3463) And, as the jury had already learned, Fusco and SAVINO lost their $10,000 investment, a phenomenon which became the subject of constant complaint. (T 3465 - 3466) SAVINO and Fusco, according to the witness, made it clear that they couldn't get their money back because Michael Hellerman was "with" Johnny Dio. (T 3459) This was taken by the witness to mean that the money could not be returned without Dioguardi's consent. (T 3475)

Ultimately, however, in the Summer of 1970, Fusco, when asked by Moffitt how he made out with Trimatrix, allegedly stated that "we are even". (T 3477) Concluding his direct examination, Moffitt made it clear that Trimatrix was "100% legitimate deal". (T 3516)

THE ALLEGED VICTIMS OF THE FRAUDULENT SALE

The Government produced five witnesses, including an agent of the Drug Enforcement Administration, to testify that they lost various sums of money in their investment in shares of AYSL. Additionally, it was established that confirmations for these shares were received by them through the mails. (T 3543 - 3583)

THE DEFENSE

The Appellant's co-defendants produced the testimony of eight witnesses, including the defendants Dioguardi and Lombardo, to rebut their involvement in the fraudulent AYSL deal.

QUESTIONS PRESENTED.

1. Whether the evidence, considered in the light most favorable to the Government, was sufficient to support Appellant's conviction?

2. Whether the independent non-hearsay evidence was sufficient to connect the Appellant to the conspiracy charged?

STATUTE INVOLVED

Title 18, United States Code, Section 371, states as follows:

> "Conspiracy to commit offense or to defraud United States.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

POINT I

THE EVIDENCE, CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT, WAS INSUFFICIENT TO CONNECT THE APPELLANT TO THE CONSPIRACY CHARGED.

Once again, this Court is called upon to determine whether the evidence, considered in the light most favorable to the Government, was sufficient to sustain a finding that a particular defendant had joined the conspiracy which had been charged in the Indictment. Plainly stated, the issue is whether the Appellant, JOHN SAVINO, became a member of the

conspiracy to fraudulently promote the common stock of At-Your-Service-Leasing. Moreover, it should be noted that a determination of this issue would be dispositive of the entire case against the Appellant as his liability on the one substantive count, on which he was convicted, was predicated on Appellant's alleged role as a co-conspirator.[7] PINKERTON v. UNITED STATES, 328 U.S. 640 (1947).[8] In order to properly develop the issue raised herein, it is necessary to review in detail the evidence presented against the Appellant. For the sake of clarity, the evidence will be set forth in the manner in which the witnesses testified.

EDMOND GRAIFER

Edmon Graifer, a named defendant who pleaded guilty before testifying for the Government, described his alleged conspiratorial role as one of the principals of AYSL. (T 347ff) Graifer's testimony, it will be remembered, outlined the

[7]The one substantive count on which the Appellant was convicted was count 18 which charged the unlawful and knowing use of an offering circular which was false and misleading. Title 15, United States Code, Sections 77s, 77x and 17 C.F.R., Section 230.256.

[8]The PINKERTON theory of criminal liability for the substantive act was presented to the jury in the Court's charge.

conception and birth of Hellerman's Machiavellian scheme to succeed where lesser men had failed. After preliminary introductions and pre-arrangements which convinced the witness that he was about to engage in an "unclean deal" (T 472), Graifer finally met with Hellerman in the beginning of June, 1970. (T 481) The meeting, allegedly attended by Jack Kelsey and Ralph Lombardo, focused on AYSL's fiscal difficulties and Hellerman's proffered solution. (T 484) The blueprint for AYSL's economic salvation required that Hellerman would sell the authorized shares of stock in return for $45,000 "under the table". (T 484) Later, after what was purported to have been a meeting attended by Lombardo, Hellerman and Dioguardi, with Graifer absent, the witness learned that half of the fee was needed in advance. (T 485 - 489) This, then, is the alleged conspiratorial picture before the Appellant, SAVINO, surfaces.

Edmond Graifer testified that he met the Appellant, SAVINO, in 1969 when the Appellant leased an automobile from AYSL. (T 496, 1014) Approximately one week after Graifer met and agreed to his plan with Hellerman, the witness went to the Skyway Motel in Queens for the purpose of collecting auto payments from the Appellant and Fusco, who had similarly

leased a car from Graifer's company. (T 496 - 498) On cross-examination, the witness testified that he went to the Skyway Motel to meet the defendant, Lombardo, with the hope of seeing SAVINO and Fusco in order to get automobile payments which had become overdue. (T 1019) Prior to Lombardo's arrival, Graifer encountered SAVINO, Fusco, one Vic Arena and Robert Wiscs seated at a table. (T 510, 515) With regard to AYSL, the individual identified as Vic Arena solicitously asked Graifer about how the sale of the company's stock was "getting along". (T 510 - 511) Graifer then volunteered that the matter was now seemingly going well and that "Michael Hellerman is taking care of the deal". (T 511) Fusco, upon hearing this conversation, was quick to point out in a rather unequivocal manner that Hellerman lacked substance and that his ethics were suspect. (T 511) Graifer replied that there would be no problem because the matter had been attended to by Sebastian Aloi and the defendant, Lombardo, and then further revealed that Hellerman was supposed to get "$45,000 under the table". (T 511) To this Fusco plaintively asserted that Hellerman was "no goddamn good" and that "he still owes us $10,000 from awhile back". (T 511) After Graifer demurred, Fusco is alleged to have asked whether Vincent Aloi was familiar with

the "deal". (T 512) When Graifer replied that he did not know as it was Vincent Aloi's father, Sebastian Aloi, that allegedly interceded on his behalf, Fusco allegedly responded that "we'll see about it after I talk to Vincent Aloi". (T 512)

In response to the prosecuting attorney's inquiry as to whether the Appellant, SAVINO, said anything during the conversation, the witness testified as follows:

> "Yes, he said that he and Fusco were partners on the $10,000 that was still owed and this guy Hellerman was no goddamn good, he would swindle his own mother and father." (T 512)

On cross-examination, the witness admitted that during this conversation, Fusco did the talking while "Savino merely agreed in most of the conversation". (T 1023) After Fusco voiced his complaint and SAVINO "agreed", the defendant, Lombardo, allegedly arrived and displayed annoyance when Graifer mentioned that he had told the others of Hellerman's involvement with AYSL and the $45,000 fee. (T 515)

Thereafter, on a subsequent occasion, Graifer learned from Lombardo that the deal was, in the words of the prosecutor, "temporarily called off". (T 516) According to Graifer, Lombardo stated at this meeting that the deal had been aborted

because Hellerman could not dispose of the AYSL stock. (T 517). Recalling Hellerman's assurance that bringing AYSL public was a "very simple deal", Graifer allegedly stated to Lombardo that he could not accept this excuse and pointedly asked whether the deal was called off because Fusco and SAVINO "put up a squawk to Vinny". (T 517) Seizing this suggestion, Lombardo allegedly replied that "next time you'll learn not to open your mouth to everybody and tell them your business". (T 518) Unwilling to accept what was then little more than a supposition, Graifer announced his intention to see Buster Aloi in Florida to rehabilitate the deal. (T 517 - 519) This was because Graifer "felt" that SAVINO and Fusco were causing the interference and in the witness' words, "I shouldn't be penalized for an obligation that was not owed by me". (T 519)

Following this meeting, Graifer described his visit to Florida where appearances led the witness to infer that the matter had been "straightened out" between Sebastian Aloi and his son Vincent. (T 522 - 526) This inference, of course, was on the strength of a telephone conversation in Graifer's presence where the elder Aloi appeared to be speaking to his son in Italian which Graifer did not understand and at the

conclusion, Graifer received Sebastian Aloi's assurance that he should not worry about it. (T 526)

Four days after Graifer's return from Florida, Hellerman contacted Graifer and advised him that "the deal is on again". (T 528) A meeting was then arranged between Graifer and Hellerman at which Hellerman told the witness, among other things, that everything was now okay and that SAVINO and Fusco are going to get their $10,000 with the remainder of the monies allegedly going to the defendants Lombardo and Dioguardi. (T 530) Eventually, when the $45,000 was disbursed, allegedly in cash to the defendant Lombardo, Graifer was told, and again by Lombardo, that the money would be brought to Vincent Aloi whereupon $10,000 would be given to SAVINO and Fusco. (T 568) The following day, in another conversation with Lombardo, Graifer was told that the money had in fact been brought to Vincent Aloi and that SAVINO and Fusco "had gotten theirs". (T 570)

Some time later, while on vacation in Florida, Graifer stated that he had the following conversation with the defendant, Fusco:

> "We were playing Gin Rummy and I asked him, 'Well, are you finally happy now?'

I hadn't seen him in quite awhile. 'Are you finally happy that you and Johnny got $10,000?'

He said, 'I have no complaint.'

I said, 'Well, I do. He caused me a lot of aggravation. This could have been done alot easier and you could have 10,000. Couldn't you have gotten a hold of Buster and got it squared away?'

He said, 'What's the difference. You got what you wanted and I got what I wanted and everybody is happy now.' " (T 608)

In "mid-1971", the witness Graifer allegedly had a telephone conversation with the Appellant, SAVINO, regarding back car payments. This conversation was testified to as follows:

"I called him and asked him, I said, 'John you owe me several car back payments. Don't you think you ought to pay me?'

He said, 'I will pay.'

I said, 'Listen, when I had an outstanding obligation over there, when you guys stopped my deal with At-Your-Service-Leasing, you got your $10,000. I don't think you have any complaints. How about sending me my check for three months that you owe me on back car payments?' (T 652)

He said, 'Alright. It will go out in the mail.' " (T 620)

Cross-examination of Graifer elicited the candid admission

that his "feeling" that SAVINO and Fusco had roadblocked the AYSL deal was a "guess" on his part. (T 917)

JOHN KELSEY

John Kelsey, in 1969 a principal in the brokerage firm of J.L. Kelsey & Co., Inc., identified the Appellant, SAVINO, and stated that he knew him. (T 1532 - 1533) With reference to the Appellant, Kelsey testified that Hellerman told him that he owed SAVINO $8,000 or $10,000 on the Trimatrix stock deal. (T 1533)

MICHAEL HELLERMAN

Hellerman testified that he knew the Appellant, SAVINO, and the defendant, Fusco, having met them shortly after he opened his Long Island restaurant. (T 1719) With reference to the Appellant, Hellerman described his unsuccessful effort to bring the Trimatrix company public and the Appellant's investment in the Trimatrix stock. (T 1733 - 1735)[9] Hellerman testified that SAVINO and Fusco bought 5,000 shares of the Trimatrix Company for a purchase price of $10,000. (T 1735) The purchase of these shares was put in the name of Lorraine

[9]It cannot be over-emphasized that the Trimatrix offering was not the subject of any charge in the Indictment and further, that this offering was consistently characterized as "legitimate".

Savino, the Appellant's wife. (T 1735) Although the entire purchase was placed in Mrs. Savino's name, the certificate represented the "joint interest of Fusco and Savino". (T 1737)

As luck would have it, the public offering of Trimatrix "didn't materialize" and the stock representing an interest in the company became worthless. (T 1739) Following the Appellant's loss of his $10,000 investment, Hellerman had many conversations with both SAVINO and Fusco. (T 1740 - 1941) In substance, the conversations reflected the feeling of SAVINO and Fusco that they had been "robbed" by Hellerman and in return, Hellerman "kept stalling them". (T 1741) Finally, in the early part of 1970, Hellerman was allegedly summoned to the office of the defendant, Dioguardi. (T 1741) Upon his arrival, Hellerman met Vincent Aloi, Dioguardi and Fusco. SAVINO was not present. (T 1742) After protesting that Trimatrix was a "100% legitimate deal", it was agreed that when Hellerman became financially stable, he would pay back the $10,000 to SAVINO and Fusco. (T 1742)

Following this meeting, Hellerman allegedly learned through conversations with Lombardo that SAVINO and Fusco's rather low opinion of Hellerman was anything but guarded. (T 1750 - 1751) Hellerman testified that, according to Lombardo,

SAVINO and Fusco were constantly deprecating Hellerman and made their views known to Buster Aloi. (T 1750 - 1751, 1801) Ostensibly, because of these damaging blows to Hellerman's reputation for trustworthiness, the promotor offered to bring AYSL public without "front money" in the hope of convincing the parties that the SAVINO and Fusco assessment of his good faith was in error. (T 1802) Eventually, Hellerman learned, again allegedly through Lombardo, that the new method had been approved by Vincent Aloi. (T 1836) However, an integral part of the deal would be that "Johnny Savino and Patty Fusco had to get back their $10,000". (T 1836) This new proviso was, according to the hearsay testimony, the result of SAVINO and Fusco "bugging Vinny and telling him that they'll never get the money back". (T 1837) Despite Hellerman's protest that the new arrangement wasn't "fair", the witness agreed to it. (T 1838) At a later meeting in the defendant Dioguardi's presence, Lombardo allegedly told Hellerman again that:

> "It was Johnny Savino and Checko [Fusco] going to Vinny Aloi and killing the first deal and insisting that they get paid the $10,000 in order for me to able to do the deal." (T 1841)

After the AYSL stock offering had been re-oriented and

the sale of stock was in progress, Hellerman had a chance encounter on a sidewalk with Fusco alone, who allegedly stated that "You only got the deal because of Johnny Savino and myself". (T 1847) Inviting Hellerman into a nearby restaurant for a drink, the pair met Vincent Aloi. To further impress his guest, and again with SAVINO absent, Fusco requested Aloi to "tell him [Hellerman] he only got the deal because of Johnny Savino and myself". To this, Aloi allegedly "nodded his head yes". (T 1850)

Prior to the closing of the AYSL deal, Hellerman testified that SAVINO and Fusco came to his office to check on the progress of the closing. (T 1854) More particularly, Fusco wanted to know when he would get the $10,000 returned to him. (T 1854) Hellerman's prognosis was that the matter was going well and should be finalized in one week. (T 1854) Ultimately, after the closing and after the monies had been disbursed, Hellerman was alleged to have learned through a conversation with Dioguardi that the $10,000 had been returned to SAVINO and Fusco. (T 1873 - 1874)

Approximately one week after this conversation, Hellerman allegedly had the following conversation in his home with SAVINO:

"I asked Johnny when he came in, 'Did you get your $10,000?' And he said, 'Yes.' I said, 'John, I want to tell you something - ' talking to Johnny Savino now - I said, 'You know its over with now and you got your $10,000, but you and Checko didn't do a right thing,' I said, 'because you stopped the deal and you went to Vinny Aloi and you killed the deal just so you would get your $10,000 back, not thinking that I could pay off Hicky and all the other obligations I had. If the deal went through the first time, I probably could have made both $50,000 shares and made alot more money and you didn't care, you didn't even come to see me about it, you didn't even come and talk to me about it, you were in the house and you didn't even say a word to me, but you went behind my back and you went to Vinny Aloi to kill the deal.'

And he said, 'I had to do that, Mike, because I had to protect my $10,000 and I didn't want you to think that I was a bad guy.' " (T 1912)

Despite this implicit affirmation by SAVINO that he had "stopped the deal", Hellerman testified on cross-examination that he was told by another party not to be concerned because "the deal will go through despite Fusco's opposition". (T 2172) And again, Hellerman's cross-examination affirmed the fact that the Trimatrix stock issue was perfectly legitimate. (T 2205, 2259)

ANDREW NELSON

Andrew Nelson, who formed Tech-Ec Systems (T 2696),

substantiated the Appellant's visit to Hellerman's office shortly prior to the closing. (T 2797) After waiting some 30 to 45 minutes before the Appellant and Fusco emerged from Hellerman's office, the witness made the rather astute observation that Hellerman was in a "bad mood". (T 2798) There was, however, no discussion regarding SAVINO. (T 2873)

STEVEN SHOENGOLD

Steven Shoengold, the employee of J.M. Kelsey & Co., gave testimony relative to the Appellant, SAVINO, of equally insignificant moment. Shoengold testified that, although he had no knowledge of whether SAVINO had any involvement in AYSL (T 3013 - 3014), he had seen him in the company of Michael Hellerman several times in 1969. (T 3012 - 3013)

MORRIS WINTER

Morris Winter, the attorney-witness, testified that he met the Appellant, SAVINO, in 1968. (T 3239) With reference to Hellerman's debt to SAVINO, Winter described the brief history of the Trimatrix Company of which he became a principal. (T 3240 - 3241) After SAVINO and Fusco had made their purchase of the Trimatrix shares, SAVINO allegedly contacted Winter because his stock certificate had not been issued. (T 3242 - 3243) Eventually, the stock certificate was issued

in the name of SAVINO's wife and mailed to the SAVINO residence. (T 3243 - 3244) Later, at about the time of the closing on the AYSL deal, Hellerman told Winter that there was pressure to have the $10,000 which had been invested in Trimatrix returned to SAVINO and Fusco. (T 3254) In mid-August of 1970, Hellerman returned the Trimatrix stock certificate which had been issued to SAVINO and allegedly explained that SAVINO and Fusco had been refunded their $10,000. (T 3259 - 3260)

CARL BURGESS

Through the testimony of Special Agent Carl Burgess of the Federal Bureau of Investigation, a stipulation was produced which established that the Appellant's fingerprints were found on the Trimatrix stock certificate and an accompanying letter from attorney Winter to Mrs. Savino. It was conceded, therefore, that SAVINO had received the stock certificate issued by Winter.

THOMAS MOFFITT

Thomas Moffitt, the last Government witness to mention SAVINO, testified that he met the Appellant some seven or eight years prior to the trial at Holiday Inn which he partially owned. (T 3456) Moffitt stated that he invested

$25,000 in Trimatrix and later became Chairman of the company. (T 3459) Apparently, because of his involvement, Moffitt was made aware that Fusco and SAVINO had also bought stock in the company. (T 3460 - 3462) As previously established, the Trimatrix deal failed and Moffitt, as well as the Appellant, lost his investment. (T 3465)

According to Moffitt, on subsequent occasions, SAVINO and Fusco complained to both the witness and Hellerman in "strong language". (T 3466) Not surprisingly, the substance of the complaint was that the pair wanted their money back. (T 3466) However, this desire to recoup their losses was allegedly frustrated by the fact, allegedly admitted to Moffitt in conversation, that Hellerman was "with Johnny Dio". (T 3469) In the Summer of 1970, at a chance meeting with Fusco, the witness was allegedly told, with SAVINO again absent, that "we are even". (T 3477) Interestingly enough, Moffitt, in response, wanted to know whether he, too, could get his money back from the Trimatrix deal. (T 3477) Despite Moffitt's revelation that a year or two earlier Trimatrix was "the most exciting thing in our lives", the collapse of the company evoked anger on the part of the witness also. (T 3516 - 3524) And, as with the Appellant and Fusco, the angry Moffitt looked

toward Hellerman:

"Q. What did you say? Did you object to the loss?

A. Certainly.

Q. You were angry about it?

A. Certainly.

Q. Did you tell Hellerman about it?

A. I certainly did.

Q. Did Fusco tell Hellerman about it?

A. Yes, he did.

Q. And Savino did also; is that right?

A. Yes, sir." (T 3524 - 3525)

Furthermore, Moffitt's anger was not diminished by the fact that Trimatrix was a "100% legitimate deal". (T 3516)

THE SUFFICIENCY ARGUMENT

At the conclusion of the Government's case, Appellant's trial counsel unsuccessfully moved for a Judgment of Acquittal on the factual ground that SAVINO "never did become involved in the conspiracy" nor did he "participate in any manipulation of [the] stock". (T 3620 - 3621) In denying Appellant's Motion, the Trial Court apparently rested on a finding that the Appellant and Fusco collectively had the ability to stop

the conspiracy and further, "elected" to share in the proceeds. (T 3624 - 3625) Whether these two essential alleged conspiratorial acts were sufficiently proven by independent evidence is an issue to be dealt with in another point in this brief. The threshold question raised in this point is whether, on the basis of all the evidence, hearsay and non hearsay alike, the record can support a finding that the Appellant became a member of the conspiracy.

What was this evidence then in the simplest of terms? The record discloses that some time in 1969 or early 1970, a conspiracy was hatched to fraudulently sell to the public the stock of At-Your-Service-Leasing. Prior to the Graifer-Hellerman conspiracy, the birth and untimely death of the Trimatrix stock offering caused Hellerman to acknowledge a $10,000 debt to the Appellant and the defendant, Fusco. And even prior to the time that the AYSL proposition was brought to Hellerman, it was agreed that Hellerman would repay this debt when he became financially able to do so.

Shortly after the alleged criminal agreement to bring AYSL public is developed, SAVINO, while with Fusco, fortuitously learns that a "deal" is in progress for which Hellerman is to

receive a fee of $45,000 "under-the-table". Following this chance discovery, Fusco, together with the Appellant, supposedly derail the AYSL deal until, with the alleged help of others, they became third-party beneficiaries.[10] Finally, after the $45,000 fee was paid, it could be inferred that the Appellant and Fusco received the $10,000 owed to them. This, then, was the evidence which was given to the jury in order to determine the Appellant's guilt beyond a reasonable doubt. UNITED STATES v. TAYLOR, 464 F.2d 240 (2nd Cir., 1972). This also was the evidence on which the jury found the Appellant guilty of conspiracy and, under the theory of PINKERTON v. UNITED STATES (SUPRA), guilty of count eighteen of the Indictment relating to the fraudulent use of an offering circular.

Appellant, JOHN SAVINO, respectfully submits that after the Government is given the benefit of drawing all inferences in its favor, the evidence presented simply cannot support a

[10]For purposes of this issue, the observation that the Appellant could stop the deal and then elect to start it again is accepted in the most liberal spirit of considering the evidence in the light most favorable to the Government. GLASSER v. UNITED STATES, 315 U.S. 60 (1942); UNITED STATES v. TUTINO, 269 F.2d 488 (2nd Cir., 1959). It is submitted, however, that the record clearly does not support this finding. Hellerman testified on cross-examination that he was told the deal would go on despite Fusco's opposition. (T 2172)

finding that he joined the conspiracy charged in the Indictment. This argument is two-dimensional. First, there is in this record not a scintilla of evidence, direct or circumstantial, that JOHN SAVINO knew that the AYSL deal was a fraudulent one. Secondly, there is absolutely no evidence that the Appellant did anything whatsoever in furtherance of the conspiracy charged in an effort to make it succeed.

It must be remembered that each of the witnesses who testified to the abortive Trimatrix stock deal, Winter, Moffitt and the infamous Hellerman himself, stated unequivocally that the offering was "legitimate".[11] Indeed, this assertion was uncontradicted. Therefore, on this record, there was nothing in the prior Trimatrix deal which would alert SAVINO to the fact that Hellerman was now engaged in a plan with unlawful means or objective. What, then, in the record can support a finding that SAVINO had the threshold requirement of knowledge? The only evidence elicited which even approaches this element is found in Graifer's testimony concerning the chance meeting with SAVINO at the Skyway Motel. There it was stated in passing

[11](T 2205, 3523)

that Hellerman was supposed to get $45,000 "under-the-table". (T 511) Is this fleeting reference to the fact that Hellerman's fee was "under-the-table" sufficient to inform SAVINO that the AYSL deal was illegal? And, if it was, then what was the illegality? In other words, what were Graifer and Hellerman conspiring to do? Could "under-the-table" have meant that Hellerman would not declare his fee on his Federal income tax return?

This Court has made it clear that an individual cannot be held liable for joining a conspiracy where the extent of his knowledge is that the conspirators were going to "do something wrong" or "to violate the law". UNITED STATES v. GALLISHAW, 428 F.2d 760 (2nd Cir., 1970). In GALLISHAW, the Court held with regard to a defendant who supplied a machine gun to others who conspired to rob a bank, that "the Government would have had to show at a minimum that he knew that a bank was to be robbed". 428 F.2d at p.763. In the instant case, the Government failed to show that SAVINO knew that AYSL stock would be fraudulently sold and manipulated.

Furthermore, the principles applied to the GALLISHAW case provide an even stronger predicate for Appellant's argument at bar. GALLISHAW's act of supplying the machine gun

unquestionably furthered the conspiracy, the question there was whether the defendant had knowledge of what he was furthering. In the instant case, not only is there no evidence as to what the objective of the conspiracy was, there was similarly no evidence that SAVINO did any act or agreed to do any act which would further the illegal objective. There is hardly any need for citational support for the proposition that mere association with conspirators is insufficient basis for a finding participation. UNITED STATES v. DI RE, 159 F.2d 818 (2nd Cir., 1947); UNITED STATES v. STROMBERG, 268 F.2d 256 (2nd Cir., 1959). In DI RE, it was also observed that the accused must have associated himself with the conspirators "in the sense that he has a stake in the success of the venture". Here, however, SAVINO's "stake" was in the success of Hellerman. Moreover, that stake, even after SAVINO was advised of and became interested in the AYSL deal, bore no relation to any illegal act or agreement to act illegally. Certainly, when SAVINO and Fusco visited Hellerman one week prior to the closing, they were interested in the success of the AYSL deal. However, that interest was no different from any ordinary creditor who had a lien on the assets of an individual who was currently engaged in a new business enterprise.

The fact that SAVINO and Fusco, on this occasion, put Hellerman in a "bad mood" is not inconsistent with this position. (T 2798 - 2799)

On review, we cannot lose sight of the fact that the alleged criminal agreement was to fraudulently sell, promote and manipulate the AYSL stock. This is the agreement that must have been inferable to SAVINO. UNITED STATES v. BORELLI, 336 F.2d 376 (2nd Cir., 1964). This Court in BORELLI, quoting Judge Learned Hand's earlier decision in UNITED STATES v. FALCONE, 109 F.2d 579 (2nd Cir., 1940), reaffirmed the principal that:

> "In order for a man to be held for joining others in a conspiracy, he 'must in some sense promote the venture himself, make it his own' ". 336 F.2d at p.385

Here, again, there is absolutely no evidence that SAVINO made the AYSL deal his own or in any sense promoted the venture. Furthermore, this assertion is compatible with Appellant's earlier argument that the evidence failed to show knowledge of unlawful purpose.

In UNITED STATES v. SPOCK, 416 F.2d 165 (1st Cir., 1969), the Circuit Court, in determining whether the evidence was sufficient "...to take the defendant to the jury" divided the

issue into three parts.

> "First, whether there was evidence of an agreement; second, whether the agreement contemplated or included illegal activity; third, whether the defendants individually adhered to that illegality." 416 F.2d at p.174

Prefatorily, the Court noted that all conspiracy law "is directed only at those who have intentionally agreed to further the illegal object". In the instant case, the Appellant, SAVINO, does not challenge the evidence of an agreement. Nor, for purposes of this argument, does he contest the fact that the agreement contemplated or included illegal activity. However, with regard to the third aspect as set forth in SPOCK, it is submitted that there is no evidence that SAVINO adhered to that illegality. In this regard, this Court has consistently advanced the principle that:

> "Where the crime charged is conspiracy, a conviction cannot be sustained unless the government establishes beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute."

UNITED STATES v. CANGIANO, 491 F.2d 906 (2nd Cir., 1974); UNITED STATES v. DE MARCO, 488 F.2d 828 (2nd Cir., 1973); UNITED STATES v. CRIMMINS, 123 F.2d 271 (2nd Cir., 1941). Here, there is simply no evidence which can support a finding that SAVINO had

the requisite intent to violate any of the enumerated Federal criminal statutes.

In INGRAM v. UNITED STATES, 360 U.S. 672 (1959), the Supreme Court held that the evidence of conspiracy was insufficient as to the petitioners Smith and Law. The issue presented with regard to these two defendants was whether the proof supported a finding that they had the requisite knowledge that the operators of a large-scale gambling business, in which they were involved, were liable for Federal taxes. The Court there stated that:

> " 'Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself.' The substantive offense which Smith and Law were accused of conspiring to commit was the willful evasion of federal taxes, an offense which, even presuming knowledge of the tax law, obviously cannot be committed in the absence of knowledge or willfulness."

It was further stated that:

> "The record is completely barren of any direct evidence of such knowledge. It was not shown, for example, that any reference had been made by any of the petitioners to possible tax liability, or that they had filed a return or paid a tax in previous years."

The Court, in rejecting the Government's argument, noted its

reliance on the fact that the petitioners were closely tied to the gambling operation and its concealment.

In the instant case, the substantive offense which SAVINO was accused of conspiring to commit was, in essence, the fraudulent interstate offer or sale of securities. And as in INGRAM, there is here a wholly inadequate foundation for a finding that the Appellant had knowledge that a fraudulent scheme was being employed. In fact, in the case at bar, the proof is far less substantial than in INGRAM. Unlike the successful petitioners, Smith and Law, SAVINO was never connected to the organization, promotion or sale of the stock.

Appellant's argument, therefore, is that he did not have the requisite knowledge, intent and willfulness to violate the substantive fraudulent securities statute, Title 15, United States Code, Section 77x. It then becomes axiomatic that his alleged act of stopping the conspiracy and then permitting it to continue after a promise that his lien would be satisfied, did not sufficiently demonstrate that he joined the conspiracy. There is simply no testimony that SAVINO was told or ever learned that certain disclosures would not be made or that misrepresentations and fraudulent devices would be employed.

Plainly stated, SAVINO knew that Hellerman was in a deal which was designed to make money and which could, under other circumstances, have made money lawfully. He then did his level best to insure that a prior debt would be repaid. This conduct, it is respectfully submitted, is wholly insufficient to support the conviction at bar.

POINT II

ASSUMING ARGUENDO THAT THE APPELLANT'S INTERFERENCE WITH THE CONSPIRACY AND SUBSEQUENT RECEIPT OF PAYMENT WAS A KNOWING CONSPIRATORIAL ACT, THEN THE INDEPENDENT PROOF OF THAT ACT WAS INSUFFICIENT.

Appellant's position is that his activity with the alleged co-conspirators did not rise to an act in furtherance of the conspiracy and, moreover, if it somehow did further the conspiracy, the Appellant did not have the requisite knowledge and intent to be held liable as a co-conspirator. Assuming for the sake of argument, however, that "bugging Vinny" and "bad-mouthing Hellerman" until SAVINO and Fusco received their $10,000 were knowing conspiratorial acts, there was, it is submitted, insufficient non-hearsay evidence to establish SAVINO's role in the conspiracy. It is well-established that although

hearsay declarations of a conspirator made in the course of and in furtherance of the conspiracy are admissible against co-conspirators, there must be independent evidence establishing a defendant's participation in the conspiracy before such declarations are admissible against him. UNITED STATES v. CALABRO, 449 F.2d 885 (2nd Cir., 1971). It is equally clear that the necessary independent proof must be substantial and not "too slight". UNITED STATES v. CONSOLIDATED LAUNDRIES CORP., 291 F.2d 563 (2nd Cir., 1961); UNITED STATES v BENTVENA, 319 F.2d 916 (2nd Cir., 1963). The detailed analysis of the facts relevant to the Appellant disclose that two conversations, one with Graifer and one with Hellerman, compose the totality of SAVINO's "independent acts". The importance of these conversations bears repetition. Graifer, in mid-1971, while attempting to collect back car payments from SAVINO, allegedly had the following conversation:

> "I called him and asked him, I said, 'John you owe me several car back payments. Don't you think you ought to pay me?'
>
> He said, 'I will pay.'
>
> I said, 'Listen, when I had an outstanding obligation over there, when you guys stopped my deal with At-Your-

Service-Leasing, you got your $10,000. I don't think you have any complaints. How about sending me my check for three months that you owe me on back car payments?'

He said, 'Alright. It will go out in the mail.' " (T 620, 652)

After the AYSL closing, Hellerman allegedly had the following conversation with SAVINO in Hellerman's home:

"I asked Johnny when he came in, 'Did you get your $10,000?' And he said, 'Yes.' I said, 'John, I want to tell you something - ' Talking to Johnny Savino now - I said, 'You know its over with now and you got your $10,000, but you and Checko didn't do a right thing,' I said, 'because you stopped the deal and you went to Vinny Aloi and you killed the deal just so you would get your $10,000 back, not thinking that I could pay off Hicky and all the other obligations I had. If the deal went through the first time, I probably could have made both $50,000 shares and made alot more money and you didn't care, you didn't even come to see me about it, you didn't even come and talk to me about it, you were in the house and you didn't even say a word to me, but you went behind my back and you went to Vinny Aloi to kill the deal.'

And he said, 'I had to do that, Mike, because I had to protect my $10,000 and I didn't want you to think that I was a bad guy.' " (T 1912)

This Court, in UNITED STATES v. MARRAPESE, 486 F.2d 918 (2nd Cir., 1973), held that once a conspiracy is shown, only slight evidence is needed to link another defendant with it. In the instant case, it is submitted, the independent evidence is "too slight". UNITED STATES v. CONSOLIDATED LAUNDRIES CORP. (SUPRA). Unlike the Appellant, Zinni, in MARRAPESE, there was nothing else to connect the defendant to the conspiracy charged in the Indictment. SAVINO's alleged implied assent to accusation by Graifer and Hellerman did not relate to a material aspect of the fraudulent scheme. Moreover, there was simply no other evidence. SAVINO was never present at any meeting where any aspect of the workings of the AYSL deal was discussed.

It only remains to be said that the Government has, in the instant case, secured the Appellant's conviction on the concept of guilt by association. Proof of an organizational structure rather than statutorily proscribed conduct has apparently swept the Appellant into the net of a conspiracy which bears no relation to count 1 of the Indictment nor, indeed, receives any factual support in the record. Such a conviction, it is respectfully submitted, is repugnant to the precepts of our Constitution and cannot be permitted to stand.

POINT III

APPELLANT, JOHN SAVINO, RESPECTFULLY URGES AND ADOPTS THE POINTS RAISED BY HIS CO-APPELLANTS INSOFAR AS THEY ARE APPLICABLE TO HIM.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Appellant's conviction should be reversed and the Indictment dismissed.

Respectfully submitted,

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant-Appellant

GERALD L. SHARGEL
Of Counsel